85-325

Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

EMILIO BRUSCANTINI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER *DICKERSON v. NEW BANNER INSTITUTE*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), SHOULD BE HELD RETROACTIVE.

II.

WHETHER THE RULE OF *COX v. LOUISIANA*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), AND *RALEY v. OHIO*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), HOLDING THAT DUE PROCESS FORBIDS THE GOVERNMENT FROM ACTIVELY MISLEADING A CITIZEN AS TO THE LAW'S COMMAND, APPLIES WITH EQUAL FORCE WHERE THE CITIZEN IS MISLED BY A STATE GOVERNMENT, AND BY VIRTUE OF HAVING RELIED UPON THE STATE OFFICIALS, HE IS PROSECUTED BY THE FEDERAL GOVERNMENT.

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JUDGMENT AND OPINION OF THE COURT BELOW

On May 28, 1985, the United States Court of Appeals for the Eleventh Circuit filed an opinion affirming the conviction of the Petitioner. (App. 1-3). On July 15, 1985, the Eleventh Circuit entered an order denying the timely filed Suggestion of En Banc Consideration on Rehearing and Petition for Rehearing. (App. 4-5).

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of July 15, 1985, when the Court of Appeals denied the Petitioner's Suggestion of En Banc Consideration on Rehearing and Petition for Rehearing.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Clause 3, of the Constitution of the United States provides in pertinent part:

> No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Course of Proceedings Below

A one-count information was filed on January 19, 1984, with the United States District Court for the Southern District of Florida. The information charged that, having pled *nolo contendere* to a state felony charge of burglary, Petitioner Bruscantini violated federal firearms statutes 18 U.S.C., §§ 922(h)(1) and 924(a), by having knowingly received two firearms on August 12, 1982.

On January 19, 1984, the petitioner entered a written conditional plea of nolo contendere, pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure, preserving for review the denial of his motion to dismiss.

On September 20, 1984, the petitioner was convicted of Count 1 of the superseding information, placed on probation for five years, and ordered to pay a fine of $1,000.00. Notice of Appeal was filed on September 20, 1984, pursuant to 28 U.S.C., §1291.

On May 28, 1985, the Eleventh Circuit affirmed. (App. 1-3). Rehearing was denied July 15, 1985. (App. 4-5)

Facts

On April 17, 1974, Petitioner Emilio Bruscantini entered a plea of *nolo contendere* to a Florida burglary charge filed by information in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The state judge, the Honorable Paul Baker, withheld

adjudication of guilt and placed the petitioner on probation for two years. After the petitioner successfully completed the two-year probationary term, he was advised by the state judge, prosecuting authorities, and his counsel, that by virtue of the withheld adjudication and successful completion of probation that he did not have a "conviction". Approximately eight years later, on or about August 12, 1982, the petitioner received two firearms which gave rise to the federal charge in this case.

A one-count information was filed on January 19, 1984, with the United States District Court for the Southern District of Florida. The information charged that, having pled *nolo contendere* to the state felony charge of burglary in Dade County, Florida, on April 17, 1974, the petitioner violated federal firearms statutes 18 U.S.C., §§ 922(h)(1) and 924(a), by having knowingly received two firearms on August 12, 1982. Section 922(h)(1) prohibits the receipt of a firearm by any person who has been convicted of a crime punishable for a term exceeding one year. The second charge was dropped.

The petitioner sought dismissal of the charge on two principal grounds: (1) he was not a "convicted" person at the time he received the firearms, and (2) even if he was a "convicted" person, as defined in *Dickerson v. New Banner Institute*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) (discussed *infra*), retroactive application of *Dickerson* would be violative of the Due Process and *Ex Post Facto* Clauses. In further support of his motion to dismiss, the petitioner attached four affidavits alleging the following:

(1) Stephen I. Mechanic attested that he was the Chief Assistant Public Defender in the courtroom of

Florida Judge Paul Baker from 1972-1975. (Judge Baker passed away before the petitioner was charged in federal court.) With respect to a defendant entering a plea of *nolo contendere* to a felony and receiving a withheld adjudication of guilt and a period of probation, it was Judge Baker's practice to advise such a defendant that a withholding of adjudication of guilt was not a legal conviction for the purposes of any disabilities imposed in the future, and the defendant could lawfully possess a firearm after the period of probation.

(2) Thomas E. Scott, then Judge of the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, attested that when a defendant's adjudication of guilt was withheld and he was placed on probation, it was routine practice and procedure for the Florida judge to advise the defendant that the withheld adjudication was not a conviction, and that the defendant was prohibited from possessing a firearm only while on probation.

(3) Mike Russell, Probation and Parole Supervisor of the State of Florida Department of Probation and Parole, Dade County, Florida, stated that as to any defendant who received a withheld adjudication of guilt and a term of probation prior to February 23, 1983, that defendant would have been advised by the probation officer that the withheld adjudication did not constitute a conviction, and the probationer was prohibited from possessing a firearm only during the term of probation.

(4) Affiant Paul Pollack stated that he represented Petitioner Bruscantini before Judge Baker on the state charge. It was his routine practice to advise a defendant who pled *nolo contendere* and received a withheld

adjudication that the defendant would not be considered a convicted felon, and that the defendant could legally possess a firearm after the probationary term.

In response to the motion to dismiss, the government did not dispute any of the petitioner's factual allegations. The government argued that *Dickerson* could be applied retroactively without violating the *Ex Post Facto* Clause, and that a plea of *nolo contendere* should be treated the same as a plea of guilty for the purposes of the federal firearms statutes. The motion to dismiss was denied by the district court.

On January 19, 1984, the petitioner entered a written conditional plea of *nolo contendere*, pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure, preserving for review the denial of the motion to dismiss.

On September 20, 1984, the petitioner was convicted of Count 1 of the superseding information, placed on probation for five years, and ordered to pay a fine of $1,000.00. Notice of Appeal was timely filed on September 20, 1984.

On May 28, 1985, the Eleventh Circuit affirmed, ruling in pertinent part as follows:

—the petitioner was a convicted felon at the time of his arrest;

—*Dickerson* can be applied retroactively;

—because the government that advised the petitioner that he was not a convicted felon was not the same government that filed the firearms charge,

the petitioner could not benefit from those decisions of the United States Supreme Court that prohibit prosecution against one who reasonably relies upon interpretation of the law by authoritative officials. (App. 1-3)

REASONS FOR GRANTING THE WRIT

The petitioner's conviction in this case violates the constitutional prohibition against *ex post facto* laws, as well as fundamental notions of due process and fairness. After successful completion of probation imposed by a Florida court, the petitioner was advised by the state judge, the prosecutor, and his lawyer, that he was not a convicted felon because adjudication of guilt had been withheld pursuant to his negotiated plea. Accordingly, the petitioner had no reason to believe that he could not legally possess a firearm.

Eight years after his Florida case had been closed, the petitioner obtained firearms. The federal government filed charges against him on the ground that because of the state proceedings, he was a convicted felon who could not legally obtain firearms. The petitioner unsuccessfully sought dismissal of the federal charge in the district court and in the Eleventh Circuit Court of Appeals.

The first issue worthy of certiorari review is whether *Dickerson v. New Banner Institute*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) should apply retroactively. Petitioner Bruscantini received the firearms in 1982, before *Dickerson* had been rendered. *Dickerson* held that expunction of a state conviction does not remove the disabilities imposed by the federal gun control

statutes. Application of *Dickerson* to the petitioner is violative of due process and constitutes an *ex post facto* violation.

The Eleventh Circuit held that the retroactivity issue had already been decided adversely to the petitioner in *United States v. Garcia*, 727 F.2d 1028 (11th Cir.1984). *Garcia* held:

> There is no problem of *Dickerson* being applied retroactively to Garcia. The prevailing law in the former Fifth Circuit prior to *Dickerson* was that state statutes that withheld finality do not prevent conviction within the meaning of Sec. 922. *U.S. v. Lehmann*, 613 F.2d 130 (5th Cir.1980); *U.S. v. Padia*, 584 F.2d 85 (5th Cir.1978).

To the contrary, there were numerous problems with applying *Dickerson* retroactively. The *Garcia* holding would have one believe that the petitioner and others similarly situated were reasonably on notice that they were "convicted" persons by virtue of the "prevailing law". But *Dickerson* did not restate already settled principles of law. In fact, the state of the law would have confounded most jurists, much less the lay citizenry. One need only consider the decisions in *Lott v. United States*, 367 U.S. 421, 81 S.Ct. 1563, 6 L.Ed.2d 940 (1961), and *United States v. Dotson*, 555 F.2d 134 (5th Cir.1977), to come to the reasonable conclusion that the petitioner had *not* been "convicted".

Lott supports the claim that at the time of the petitioner's plea in state court, federal law provided that a plea of *nolo contendere* followed by a withheld adjudication of guilt did not constitute a "conviction."

Lott addressed the question of time for appeal in criminal cases. The case concerned defendants who had pled *nolo contendere* to various charges, filed motions for arrest of judgment, and notices of appeal after the motions were denied. Because of the language of Rule 34 which required that motions for arrest of judgment had to be filed within five days of the "determination of guilt", and because the trial court deferred pronouncement of judgment convicting the defendants for three months to await the outcome of the trial of two other defendants, an issue arose as to the timeliness of the notices of appeal. Reversing the dismissal of the appeals by the Fifth Circuit, this Court held that the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere*, constituted the "determination of guilt" within the meaning of Rule 34, thereby rendering timely the motions in arrest of judgment and the notices of appeal. This Court reasoned, in pertinent part:

> Although it is said that a plea of *nolo contendere* means literally "I do not contest it" . . . and "is a mere statement of unwillingness to contest and no more" . . . it does admit "every essential element of the charge." . . . Hence, it is tantamount to "an admission of guilt for the purpose of the case," . . . and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record" . . . *Yet the plea itself does not constitute a conviction nor hence a "determination of guilt." It is only a confession*

> *of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court "to render judgment" thereon.*

Lott, supra, 367 U.S. at 426, 81 S.Ct. at 1567. (e.s.)

Thus, it follows from the reasoning in *Lott*, that where the trial court does not "render judgment", there is no "conviction." *Lott* was the law of the land until *Dickerson* was rendered twenty-two years later. The petitioner's plea of *nolo contendere* in state court was entered in 1974, and no judgment of guilt was ever entered. Given *Lott*, the Eleventh Circuit's holding in *Garcia* is highly questionable.

Further support for the petitioner was to be found in *United States v. Dotson*, 555 F.2d 134 (5th Cir.1977). In *Dotson*, the Fifth Circuit affirmed an order of a federal district court which dismissed an indictment for alleged violations of 18 U.S.C., § 922(a)(6) and 922(h), on the ground that Dotson had not been previously convicted of a crime. The order of the district judge was attached to the affirmance as Appendix A and stated in pertinent part:

> The previous felony conviction referred to in the indictment allegedly occurred on February 11, 1972, in the United States District Court for the Northern District of Georgia upon a charge of unlawfully receiving and concealing a stolen motor vehicle which had been moving in interstate commerce in violation of 18 U.S.C. §2313.

> Defendant contends that he was never convicted of the above offense but rather that the district judge accepted defendant's plea of nolo contendere to the charge and imposed a suspended sentence and one year probation term, specifically withholding any adjudication of guilt. . . .
>
> * * *
>
> It appears that the clear intent of that [Georgia federal district] Court was that no adjudication of guilt be imposed, presumably so that upon completion of the term of probation, defendant's record would be clear of any conviction for that offense.
>
> Consequently, because there was no conviction of the prior offense at the time defendant purchased the firearm he had not previously been convicted of a felony and therefore made no false statement on his application for the firearm, nor did he receive the firearm unlawfully . . .

Dotson, supra, 555 F.2d at 135-136.

The only distinction between *Dotson* and the case at bar is that the underlying alleged "conviction" in *Dotson* arose from a federal charge as opposed to a state charge. This is a distinction without a difference. *Dotson* and the petitioner were in identical situations and relied upon the same advice by the judges who placed them on probation. The Fifth Circuit decision in *Dotson* and this Court's decision in *Lott* call into serious

question the *Garcia* holding that the prevailing law prior to *Dickerson* did not support the petitioner.

The *Padia* and *Lehmann* cases cited in *Garcia* did not clearly establish that persons such as the petitioner would be considered "convicted" persons. The two cases hardly informed the petitioner or those similarly situated in clear terms consistent with due process requirements that they could not receive firearms, and neither purported to overrule *Dotson*.

Lehmann is also distinguishable because the defendant in that case had been found guilty of felony theft. The Fifth Circuit held that suspension of his sentence did not alter his status as a convicted felon. Here, the petitioner was neither found guilty nor adjudicated guilty. *Padia* is similarly distinguishable because the defendant in that case was convicted.

In addition to the issue of the retroactivity of *Dickerson*, certiorari review is appropriate because fundamental notions of fairness and due process clash with the novel, narrow reading given *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), and *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), by the Eleventh Circuit. In brief, *Cox* and *Raley* held that due process forbids the government from actively misleading a citizen as to the law's command. The Eleventh Circuit held that this principle of due process is limited to situations where the government that misleads is the same government that prosecutes. That court further held that due process is not implicated where the citizen is misled by a state government, and by virtue of having relied upon the state officials, he is

prosecuted by the federal government. Whether *Cox* and *Raley* were intended to be so limited is questionable and worthy of certiorari review by this Court.

In all likelihood, there are countless others, in addition to the petitioner, who have relied upon state government representations that they are not "convicted" persons by virtue of adjudications having been withheld by the state courts. Yet these persons are subject to federal prosecution if they have applied for or received firearms having reasonably relied upon their state government's pronouncements. Despite the apparent unfairness, only this Court can remedy this situation through certiorari review of the claimed due process and *ex post facto* violations.

CONCLUSION

The Petitioner requests that certiorari review be granted, that his conviction be reversed, and that the charge be dismissed.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Emilio BRUSCANTINI,
Defendant-Appellant.

No. 84-5780
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

May 28, 1985.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

GODBOLD, Chief Judge:

This is an appeal from a denial of a motion to dismiss the indictment. We affirm.

In 1974 appellant Bruscantini entered a plea of *nolo contendere* to a Florida burglary charge. The state judge withheld adjudication of guilt and placed him on probation. Appellant was told that the disposition of his case did not constitute a conviction. He successfully completed his probationary term.

In 1982 Bruscantini obtained two firearms. He was subsequently charged with violating 18 U.S.C. §922(b) (1982), which prohibits convicted felons from receiving firearms that have been shipped in interstate commerce. He was also charged for making false statements to the vendor of the firearms in violation of 18 U.S.C. §924(a) (1982). This second charge was dropped. Bruscantini entered a conditional plea of guilty to the first charge, reserving the right to appeal the court's denial of his motion to dismiss the indictment. He received a $1,000 fine and was sentenced to five years probation.

Appellant claims that he was not a convicted felon at the time of his arrest for receiving firearms because he had pleaded *nolo contendere* to the state burglary charge and because the state judge had withheld adjudication. We rejected this argument in *U.S. v. Garcia*, 727 F.2d 1028 (11th Cir.1984) (relying upon *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983)). Appellant's second contention, that *Dickerson* cannot be applied retroactively, was also rejected. *See U.S. v. Garcia, supra.*

Appellant's final contention is that he cannot be convicted for violating §922 because the state judge who accepted his *nolo* plea, as well as the state prosecutor, told him that he was not a convicted felon. Therefore, he argues, because he reasonably relied upon the interpretation of law provided by authoritative state officials, he cannot now be convicted for violating a statute that prohibits convicted felons from possessing firearms. Appellant's estoppel argument was held to establish a valid defense in *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), and *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).

The facts of this case do not warrant application of the rule of *Cox* and *Raley*. Here, while state officials provided the interpretation upon which appellant relied, federal officials indicted and convicted him for a violation of federal law. On the other hand, in both Supreme Court decisions, state officials had interpreted state law and subsequently convicted the defendants under that law. This distinction is important here, particularly where the analysis of the federal law §922, does not depend on state practice, *see Dickerson v. New Banner Institute, Inc., supra*, and where knowledge of one's status as a convicted felon is not an element of the offense of receiving firearms. *See U.S. v. Goodie*, 524 F.2d 515 (5th Cir.1975), *cert. denied*, 425 U.S. 905, 96 S.Ct. 1497, 47 L.Ed.2d 755 (1976).

The rule of *Cox* and *Raley* is a narrow exception to the general principle that ignorance of the law is no defense. It was prompted by the Court's observation that permitting the government to prosecute individuals who reasonably rely upon that government's interpretation of the law would constitute a kind of entrapment. Where, however, the government that advises and the government that prosecutes are not the same, the entrapment problem is different. Moreover, if one benefit of the estoppel defense is that it encourages government officials to better know and articulate the law, that benefit is not present where application of the defense would penalize the wrong government—the government that prosecuted appellant rather than the government that mistakenly and misleadingly interpreted the law. Appellant, therefore, is not insulated from prosecution.

AFFIRMED.

[FILED JUL 10, 1985]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-5780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EMILIO BRUSCANTINI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 28, 11 Cir., 198____, ____F.2d____).

(JULY 15, 1985)

Before GODBOLD, CHIEF JUDGE, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge